National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: May 25, 1995

TO: F. Rozier Sharp, Regional Director, Region 17

FROM: Barry J. Kearney, Acting Associate General Counsel, Division of Advice

SUBJECT: Matney Colonial Manor, Inc., Cases 17-CA-17725, -17776

177-8520-0800, 177-8520-1600, 177-8540-8050, 177-8580-8050

These cases were submitted for advice as to whether the Charging Party is a Section 2(11) supervisor or a statutory employee in light of NLRB v. Health Care & Retirement Corp.[(1)]

FACTS

Charging Party Dianna Suggitt is a licensed practical charge nurse in the Employer's extended health care facility. Case 17-CA-17725 alleges that she was issued a two-week disciplinary suspension, in violation of Section 8(a)(1), for engaging in protected concerted activities. Case 17-CA-17776 alleges that she was subsequently given another disciplinary warning and then terminated in violation of Section 8(a)(4). The Region has concluded that the charges are complaint-worthy if Suggitt is a statutory employee.

The Region has concluded that charge nurses such as Suggitt exercise only routine, as opposed to responsible, direction of aides and other employees in the Employer's facility. The Region requests advice as to whether Suggitt could effectively recommend discipline under Section 2(11).

Charge nurses such as Suggitt do not have the authority to hire or fire employees. The charge nurses do have the authority to issue disciplinary warnings and have done so. The employee handbook states, as to warnings, that oral warnings and first written warnings may be given by the employee's immediate supervisor or charge nurse. The second written warning "is given by the immediate supervisor/charge nurse and the department head; this will result in termination at the discretion of the supervisor and the department head." (emphasis added). Thus, the Director of Nursing retains the right to overturn or disregard such warnings. The DON admits that she has that right, although she claims that she merely accepts warnings issued by charge nurses and does not additionally investigate the circumstances surrounding the warning. The charge nurses also have no authority to determine, or even recommend, the nature of any disciplinary action to be imposed on the basis of their warnings. The DON or the owner of the facility decides whether any discipline in addition to the warning is warranted.

Suggitt gave one employee -- Verleen Rose -- two warnings, one labeled "second written warning," in May 1992. Rose was still working for the Employer at the time of the events underlying these charges. Suggitt gave another employee -- Cathy Alspach -- one written warning and two verbal warnings between June 6, 1991, and May 2, 1992. It appears that Alspach still works for the Employer. However, it does not appear that Alspach ever received two written warnings.

ACTION

We conclude that Suggitt does not effectively recommend discipline within the meaning of Section 2(11).

The Board, without regard to the "patient care analysis" at issue in Health Care, has consistently held that charge nurses who issue warnings to employees perform only a "reportorial" function and do not effectively recommend discipline under Section 2(11) where the warnings do not lead to personnel action or, "if they do, such action is not taken without independent investigation or review by others."[(2)]

In Northcrest, at 497, the Board noted that in "typical charge nurse cases," individuals can issue oral and written warnings but the director of nursing or some other administrator or manager independently investigates and "decides what, if any, discipline is warranted." The Board further noted that even where there are personnel policies regarding the consequences of a specified number of warnings, "these policies are not always followed." After describing such personnel practices, the Board stated that, when "confronted with these facts, we have held that charge nurses are not supervisors because their warnings, either individually or in the aggregate, do not lead to personnel action; or, if they do, such action is not taken without independent investigation or review by others." Id. In these circumstances, the Board holds that warnings given by charge nurses are "merely reportorial and not an indicium of supervisory authority." Id. (footnote omitted).

Here, the evidence as to disciplinary authority shows that the Employer's policies and practices are almost identical to those described above in Northcrest.

The Employer claims that it has a progressive disciplinary system and that charge nurses effectively recommend discipline by giving warnings to employees. However, discharge is not an inevitable consequence of an employee's receiving two written warnings because the Director of Nursing has the authority to determine the appropriate discipline in any situation. Indeed, the Employer does not claim that any employee who received two written warnings was discharged pursuant to the disciplinary policy, even though it appears that one employee received a warning labeled "second written warning." Moreover, the Employer's claim that charge nurses such as Suggitt effectively discipline employees by deciding whether to issue written or verbal warnings is erroneous since the stated disciplinary policy reserves to the DON the authority to determine whether discharge, or some lesser form of discipline, is appropriate after an employee receives two written warnings.

For these reasons, we conclude that the Employer has not met its burden of demonstrating that charge nurses such as Suggitt can effectively discipline other employees. Since the Region has apparently concluded that none[(3)] of the other supervisory criteria are met and that the charges are meritorious, complaint should issue, absent settlement.[(4)]

B.J.K.

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[1] ___U.S.___, 114 S.Ct. 1778, 146 LRRM 2321 (1994).

[2] Northcrest Nursing Home, 313 NLRB 491, 497 (1993).

[3] [*FOIA Exemption 5*].

[4] Given our conclusion that the Charging Party is a 2(3) employee, it is not necessary to reach the question of whether a Section 8(a)(4) complaint would have been warranted had Suggitt been deemed a supervisor.